a new trial which would enable the prosecution to take advantage of their own default by calling a witness whom they should have called at the trial and who, as stated previously in this judgment, was present in Court at the trial.

The only remaining question for us to decide is whether there is sufficient evidence on the record which would entitle us to alter the conviction for murder to one for any lesser offence. As to that there is the evidence of Lall Din that the deceased's head had been smashed and was bleeding from the blows the deceased had received from the appellant and Duleep Singh. In the absence of any medical evidence we cannot presume that any bones had been broken, but Lall Din's evidence makes it certain that the appellant and Duleep Singh caused hurt to the deceased. Therefore a conviction for voluntarily causing hurt can be substituted for that of murder.

Accordingly we quash the conviction for murder and the sentence of death, and substitute therefor a conviction for voluntarily causing hurt under section 323 of the Penal Code. As regards sentence, we impose the maximum sentence under that section i.e. rigorous imprisonment for one year, to commence from the date of this judgment, that is from the 17th of September, 1948.

Order Accordingly.

WONG HENG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, JJ.) October 2, 1948]

[K.L. — Criminal Appeal No. 97 of 1948]

Criminal Procedure Code Ss. 197, 198 and 199 — Trial with the aid of assessors — Failure of Trial Judge to record the conviction of accused — Whether such omission can be cured under Section 422 of the Criminal Procedure Code.

In this case the appellant was tried for being in possession of a hand-grenade. At the close of the evidence, the learned Trial Judge summed up to the Assessors and both the Assessors gave their opinions that the appellant was guilty of the offence charged. The learned Trial Judge recorded these opinions and also recorded his own opinion that he agreed with them. But there was nothing in the record to show that the learned Trial Judge gave judgment by convicting the appellant as required by Section 198(1) of the Criminal Procedure Code. The record only showed that the appellant was sentenced to death.

Held, that the failure of the learned Trial Judge to record that he gave judgment by convicting the appellant was an irregularity but that such irregularity can be cured under Section 422 of the Criminal Procedure Code.

Cases referred to :—

(1) *Ng Peng Choon v. Public Prosecutor* (1947) M.L.J. 87.

(2) *Govindasamy v. Public Prosecutor* (1949) M.L.J. 101.

(3) *Joseph v. King* (1948) A.C. 215.

(4) *Pulukuri Kotayya v. King Emperor* (1946-47) L.R. 74 I.A. 65.

(5) *Abdul Rahman v. King Emperor* (1926) 54 I.A. 96.

CRIMINAL APPEAL.

M. Edgar for the Appellant.

F. C. Cooke for the Respondent.

The judgment of the Court of Appeal was delivered by :—

Willan, C. J. : — This is an appeal against the conviction of the appellant by the High Court for being in possession of a hand-grenade, an offence contrary to Regulation 4(1)(b) of the Emergency Regulations, 1948.

The appellant was sentenced to death, the death sentence being mandatory on conviction for such an offence.

The trial took place with the aid of Assessors, as required by section 184 of the Criminal Procedure Code.

At the close of the evidence, the learned trial Judge summed up to the Assessors in accordance with section 197 of the Criminal Procedure Code, and both Assessors gave their opinions that the appellant was guilty of the offence charged. These opinions were recorded by the learned trial Judge as was also his own opinion that he agreed with them. Thus the provisions of section 198(1) of the Criminal Procedure Code, and also the requirements laid down by this Court in the case of *Ng Peng Choon v. Public Prosecutor*[1], that the record must show there was positive agreement between the trial Judge and both Assessors or one Assessor, were observed.

There is nothing on the record, however, to show that the learned trial Judge complied with the latter part of the provisions of section 198(1) of the Criminal Procedure Code i.e. that he gave judgment by convicting the appellant.

The record does show that the appellant was sentenced to death, and therefore the requirements of section 199 of the Code were observed.

Mr. Edgar, counsel for the appellant, submitted that since there is nothing on the record to show that the learned trial Judge had convicted the appellant in accordance with the provisions of section 198(1) of the Criminal Procedure Code, the appellant had been sentenced to death by a Judge who had never convicted him.

In support of this argument he cited a recent decision of this Court, *Govindasamy v. Public Prosecutor*[2]. In that case there were two omissions from the record :—

(1) There was nothing to show whether the trial Judge agreed with the opinions of the two Assessors that the accused was guilty.

(2) That the trial Judge had convicted the accused.

In the case before us there is only the second omission. The result is that there is no element of doubt of the guilt of the appellant, because the learned trial Judge has expressed on the record his positive agreement with the opinions of both Assessors that the appellant is guilty. Accordingly there is no doubt that the learned trial Judge brought his mind to bear on the guilt or innocence of the appellant. Therefore, this case is distinguishable from the case of *Govindasamy v. Public Prosecutor* (*supra*) and also from the Privy Council case of *Joseph v. The King*[3] referred to in the *Govindasamy* case.

Accordingly in this case there is nothing left to us by way of conjecture as was so in the *Govindasamy* case. The only matter which remains for consideration is whether the failure of the learned trial Judge to make a note on the record that he convicted the appellant is an illegality which vitiates the trial. It is true, that in the absence of any such note, it cannot be said that the provisions of section 198 of the Criminal Procedure Code have been observed in that respect. This, according to Mr. Edgar, amounts to an illegality which cannot be cured under section 422 of the Criminal Procedure Code. Such a proposition does not accord with the view of the Privy Council in the case of *Pulukuri Kotayya v. King Emperor*[4]. There, Their Lordships of the Privy Council said :—

> "...but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of Their Lordships' Board in *Abdul Rahman v. The King Emperor*[5]".

Section 537 of the Indian Criminal Procedure Code is equivalent to section 422 of our local Code. Therefore applying that part of the judgment underlined above to the case before us we decide that the omission in the record is an irregularity which can be cured under section 422 of the Criminal Procedure Code.

Therefore this appeal is dismissed.

Appeal Dismissed.

HAJI AISHAH BINTE LEBAI ITAM v. YAH BINTI TAIB.

[App. Civil Juris. (Spenser-Wilkinson, Russell, and Briggs, JJ.) October 25, 1948]

[F.M.—Civil Appeal No. 23 of 1948]

Courts Ordinance, 1946, Sections 25 and 29—Courts Enactment, F.M.S. Ss. 16 and 17—Appeal to Court of Appeal—Jurisdiction of Magistrate—Suit relating to immovable property—Courts Enactment, Kedah S. 40(2)—Land Code Ss. 43 and 187—Civil Procedure Code, Kedah S. 116.

In this case the learned Magistrate, Jitra, had made an Order that certain land be re-transferred to the respondent by the Appellants upon her repaying to the Appellants the sum of $150.00, on the ground that the transfer was obtained by a fraudulent misrepresentation. An appeal to the High Court was dismissed and the appellant thereupon appealed to the Court of Appeal. On appeal, it was argued that the learned Magistrate had no jurisdiction to hear the suit as it involved the decision of a question of title to land.

Held, (1) that by virtue of Sections 16 and 17 of the F.M.S. Courts Enactment, an appeal lay from the High Court to the Court of Appeal and even if the subject-matter of the suit is less than $500.00 an appeal would still lie with the leave of the Court of Appeal, on the ground **inter alia**, of an error in law; (2) that the Magistrate had jurisdiction to deal with the matter by virtue of Section 25 of the Courts Ordinance, 1946.

Case referred to :—

(1) *A. S. K. Selvaduray v. Mahmood bin Tawakol* (1935) F.M.S.L.R. 191; (1935) M.L.J. 289.

CIVIL APPEAL.

T. E. Conaghan for the Appellant.

Respondent in person.

Spenser-Wilkinson, J. : — This was an appeal from the decision of the High Court in Alor Star dismissing an appeal to that Court from the decision of the